

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

BID FOR POSITION, LLC,

Plaintiff/Counterclaim Defendant,

v.

Civil Action No. 2:07cv582 (JBF-TEM)

AOL LLC,
GOOGLE INC.,
MICROSOFT CORP.,
and MIVA, INC.,

Jury Trial Demanded

Defendants/Counterclaim Plaintiffs.

**MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO FILE UNDER SEAL
CERTAIN EXHIBITS TO THE DECLARATION OF EMILY C. O'BRIEN AND
PORTIONS OF THE BRIEF IN SUPPORT OF DEFENDANT GOOGLE INC.'S
MOTION FOR A PROTECTIVE ORDER BARRING TESTIMONY
RELATED TO PLAINTIFF'S 30(b)(6) DEPOSITION NOTICE AND
DEPOSITION NOTICES BEYOND THE 10-DEPOSITION RULE**

Pursuant to Local Civ. R. 5 and the Agreed Protective Order ("Protective Order") entered by the Court on April 28, 2008, Defendant, Google Inc. ("Google"), by counsel, moves for leave to file under seal certain exhibits, including Exhibits 9, 10, 12, 13, 14, 15 and 22, to the Declaration of Emily C. O'Brien (collectively, "Confidential Exhibits") and portions of its Brief in Support of Defendant Google Inc.'s Motion for a Protective Order Barring Testimony Related to Plaintiff's 30(b)(6) Deposition Notice and Deposition Notices Beyond the 10-Deposition Rule ("Portions of the Brief in Support"). In support of this Motion, Google states as follows:

1. Paragraph 23 of the Protective Order entered in this case states:

- a. In the event a party wishes to use Protected Information, or any papers containing or making reference to the contents of such Protected Information, in any pleading or document filed with the Court in this litigation, such pleading or document and Protected Information shall

be filed under seal, until such time as the Court orders or otherwise denies permission to file under seal, and such Protected Information, or papers, shall plainly state on the first page of any bound or stapled document “Confidential—Filed Under Seal” and shall be filed only in sealed envelopes on which shall be endorsed the caption of this action and a statement substantially in the following form:

CONFIDENTIAL

This envelope contains documents that are subject to a Stipulation and Protective Order Governing Discovery Material entered by the Court in this action. This envelope shall neither be opened nor the contents revealed except by Order of the Court.

- b. Whenever a party files a document under seal with the Court, that party shall simultaneously file a motion requesting that the Court enter an order permitting the document to remain under seal. When such a motion is filed, the following steps must be taken:
 - i. The Clerk shall provide public notice by docketing the motion in a way that discloses its nature as a motion to seal, with a hearing date (if any);
 - ii. The Clerk shall provide interested persons an opportunity to submit memoranda in support of or in opposition to the motion;
 - iii. The document and any confidential memoranda shall be treated as sealed pending a ruling on the motion;
 - iv. If the Court decides to seal the documents at issue, it must state its reasons on the record, supported by specific findings; and
 - v. The Court must state its reasons for rejecting alternatives to closure.

Google agrees to follow in an expeditious manner any additional procedures imposed by the Court, including Local Rule 5 of the Local Rules of Practice for the United States District Court for the Eastern District of Virginia as a prerequisite to filing any document under seal. If the Court declines to allow the material to remain under seal, the materials shall not be unsealed until at least 10 days notice has been given to the producing party to allow for the retrieval of any designated information prior to any papers being unsealed.

2. As the Confidential Exhibits and Portions of the Brief in Support contain and/or refer to information that is designated “Confidential Attorneys’ Eyes Only” (Prosecution Bar)

under the Protective Order, Google seeks permission to file the Confidential Exhibits and Portions of the Brief in Support under seal.

3. The Confidential Exhibits and Portions of the Brief in Support contain information and testimony containing sensitive and valuable proprietary information relating, among other things, to the technical details of how certain Google systems operate, the parties' discovery disputes and certain expert contentions in this matter. Because this information is confidential by operation of the Protective Order, Google seeks permission to file the Confidential Exhibits and Portions of the Brief in Support under seal. Failing to file the Confidential Exhibits and Portions of the Brief in Support under seal may risk the disclosure of Google's confidential, trade secret information, would violate the Protective Order and potentially would cause competitive harm.

4. Google has sent copies of the Confidential Exhibits and Brief in Support to opposing counsel. *In-camera* copies of the same will be sent to the Court as well.

5. Before this Court may seal Court documents, it must: "(1) provide public notice of the request to seal an allowance to the parties a reasonable opportunity to object; (2) consider less drastic alternatives to sealing the documents; and (3) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives."

Ashcraft v. Connoco, Inc., 218 F.3d 288, 302 (4th Cir. 2000). (Internal citations omitted.)

6. In compliance with Local Rule 5 of the Rules of this Court and *Ashcraft*, Google has attached a Public Notice of Google's Motion to Seal along with a proposed Order.

7. Google requests that the Court retain sealed materials until forty-five (45) days after a final order is entered and request that unless the case is appealed that any sealed materials be returned to counsel for the filing parties.

WHEREFORE, based on the foregoing, Google respectfully requests this Motion be GRANTED and that the Confidential Exhibits and Portions of the Brief in Support be filed under seal as set forth in the Proposed Order attached as **Exhibit 1**.

Dated: July 3, 2008

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2008, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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